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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 HANS G. KOCH,

11 Plaintiff,

12 v.

13 TRAVELERS CASUALTY AND SURETY
14 COMPANY OF AMERICA,

15 Defendant.

CASE NO. C05-0842RSM

ORDER GRANTING SUMMARY
JUDGMENT

16 **I. INTRODUCTION**

17 This matter comes before the Court on defendant's motion for partial summary judgment
18 regarding plaintiff's bad faith and consumer protection claims. (Dkt. #16). Defendant argues
19 that plaintiff has failed to demonstrate either bad faith or a violation of the Washington
20 Consumer Protection Act ("CPA"), because it had a reasonable basis for denying coverage, and
21 because plaintiff cannot demonstrate a duty by defendant to investigate his claim prior to the
22 date it was tendered. Plaintiff responds that defendant violated several provisions of the
23 Washington Administrative Code ("WAC"), which constitute *per se* violations of the CPA,
24 breached its duty to defend, failed to properly investigate his claims, and acted in its own
25 interests instead of that of the insured. (Dkt. #23).
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1 For the reasons set forth below, this Court finds that plaintiff has raised issues of material
2 fact with regard to his claims of delay and lack of notification; however, because the denial of
3 coverage based on the “insurer versus insurer” clause was reasonable, plaintiff’s claims must be
4 dismissed.

5 **II. DISCUSSION**

6 **A. Background**

7 This Court has set forth the relevant factual background in its previous Order granting
8 defendant’s Motion for Summary Judgment pertaining to scope of coverage. (Dkt. #28). To
9 the extent that any other facts are relevant, they will be incorporated in the discussion below.

10 **B. Bad Faith and Consumer Protection Act Claims**

11 Whether a particular action gives rise to a Consumer Protection Act violation is a
12 question of law for the Court. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d
13 133, 150 (1997). Whether an insurer acted in bad faith is a question of fact. *Smith v. Safeco*
14 *Ins. Co.*, 150 Wn.2d 478, 486 (2003). However, questions of fact may be determined as a
15 matter of law if reasonable minds could reach but one conclusion. *Rizzuti v. Basin Travel Serv.*
16 *of Othello, Inc.*, 125 Wn. App. 602, 622 (2005). In order to maintain a bad faith claim, plaintiff
17 must show that the claim denial was “unreasonable, frivolous, untenable or unfounded.” *Smith*
18 *v. Safeco Ins. Co.*, 150 Wn.2d 478, 484 (2003); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560
19 (1998); *Leingang, supra*, at 155-56. Additionally, Washington courts have a long history of
20 rejecting both bad faith and CPA claims when “there is a debatable question regarding coverage
21 for the loss.” *See Capelouto v. Vallety Forge Ins. Co.*, 96 Wn. App. 7, 22 (1999); *see also*
22 *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633 (1996).

23 In the instant case, plaintiff asserts that several actions by defendant demonstrate bad
24 faith and *per se* violations of the CPA. First, plaintiff argues that defendant failed to conduct a
25 reasonable investigation. This argument appears to present two contentions: (1) that defendant
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1 failed to properly investigate plaintiff's claims prior to his tender of the claim for attorneys fees;
2 and (2) that defendant failed to investigate in a timely manner once plaintiff tendered his claim.

3 The Court finds plaintiff's first contention without merit. Plaintiff has provided no legal
4 authority mandating that defendant has a duty to investigate a claim prior to the time it is
5 tendered. Indeed, Washington courts have consistently held that "an insurer cannot be expected
6 to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively
7 inform the insurer that its participation is desired." *Unigard Ins. Co. v. Leven*, 97 Wn. App.
8 417, 427 (1999); see *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1420 (D.
9 Wash. 1990) (explaining that the duty to defend only arises after the insured tenders the
10 defense).

11 Furthermore, plaintiff has produced no evidence that defendant had knowledge of his
12 claim prior to the date of tender. Plaintiff argues that his agent contacted T.J. Adams, the
13 insurance broker who sold the policy to MidCorr, and therefore, defendant had knowledge of his
14 claim as early as February 2003. However, the record demonstrates that defendant was notified
15 only of a possible claim by Brent Patterson, another officer and director of MidCorr, but not
16 plaintiff's possible claim. In addition, MidCorr notified defendant that no one would be
17 submitting claims as a result of the litigation. Finally, plaintiff has not submitted admissible
18 evidence demonstrating that anyone contacted T.J. Adams on his behalf. Instead he relies on a
19 hearsay statement that an agent called T.J. Adams but did not receive any return phone calls.
20 The Court cannot rely on such evidence to defeat summary judgment. *Anheuser-Busch, Inc. v.*
21 *Natural Beverage Distribs.*, 69 F.3d 337, 345 (9th Cir. 1995); *Blair Foods, Inc. v. Ranchers*
22 *Cotton Oil*, 610 F. 2d 665, 667 (9th Cir. 1980).

23 With regard to plaintiff's second contention, the Court finds that plaintiff has raised
24 issues of material fact. Plaintiff argues that defendant violated WAC 284-30-330(3), WAC 284-
25 30-370 and WAC 284-30-380, by failing to adequately investigate his claim and by failing to
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1 adequately communicate about its investigation of the claim. WAC 284-30-330(3) makes the
2 failure to adopt and implement reasonable standards for the prompt investigation of claims
3 arising under insurance policies an “unfair method[] of competition and unfair or deceptive act[]
4 or practice[] in the business of insurance. . . .” Plaintiff first asserts that defendant violated that
5 regulation by relying only on information fed to it by MidCorr’s counsel during the renewal
6 process rather than conducting an independent investigation, culminating in a denial under the
7 wrong policy period. Plaintiff then presents *prima facie* evidence that defendant, by its delay
8 and lack of notification, violated WAC 284-30-370. Defendant has failed to provide sufficient
9 evidence to rebut its lack of proper notification.

10 However, this Court has already determined that defendant properly denied coverage of
11 plaintiff’s claim under the “insurer versus insurer” clause. That clause was the same in both
12 policy periods 2002-2003 and 2003-2004. Thus, denial based on that clause was reasonable,
13 despite the fact that defendant relied on the wrong policy period. Washington courts have
14 continuously held that “a reasonable basis for denying coverage constitutes a complete defense
15 to any claim that the insurer denied coverage in bad faith or in violation of the CPA.” *Rizzuti*,
16 125 Wn. App. at 622 (citation omitted).

17 Plaintiff also appears to argue that defendant denied his claim in bad faith because it
18 violated Washington statute by inserting exclusions specifically pertaining to him and his lawsuit
19 in MidCorr’s renewal policy. However, that claim has no merit. RCW 48.18.320 provides:

20 No insurance contract insuring against loss or damage through legal liability
21 for the bodily injury or death by accident of any individual, or for damage to
22 the property of any person, shall be retroactively annulled by any agreement
23 between the insurer and insured after the occurrence of any such injury, death,
24 or damage for which the insured may be liable, and any such annulment
25 attempted shall be void.

26 RCW 48.18.320. The D&O policy is not a general liability policy and does not cover bodily
injury or property damage; therefore, this is inapplicable.

For that reason, and those set forth above, the Court concludes that the claim denial was

1 not “unreasonable, frivolous, untenable or unfounded.” *Smith*, 150 Wn.2d at 484. Accordingly,
2 the Court finds that summary judgment in favor of defendant on plaintiff’s bad faith and CPA
3 claims is appropriate.

4 **III. CONCLUSION**

5 Having reviewed defendant’s motion for partial summary judgment (Dkt. #16), plaintiff’s
6 opposition (Dkt. #23), defendant’s reply (Dkt. #25), the declarations in support of those briefs,
7 and the remainder of the record, the Court hereby ORDERS:

8 (1) Defendant’s Motion for Partial Summary Judgment on plaintiff’s bad faith and
9 consumer protection claims (Dkt. #16) is GRANTED, and this case is DISMISSED.

10 (2) The Clerk shall forward a copy of this Order to all counsel of record.

11 DATED this _5_ day of June, 2006.

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14 RICARDO S. MARTINEZ
15 UNITED STATES DISTRICT JUDGE
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